Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL A. WILLS, an individual, and
ROBERT THURLWELL, an individual,

Petitioners,

vs.

WALT DISNEY PICTURES AND TELEVISION, Inc., a corporation, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, LOCAL #727 (Motion Picture Crafts Services), an organization,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Vaca v. Sipes*, [386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967)] and its progeny require the courts to make separate, independent, analysis of the "arbitrary" aspect, the "discriminatory" aspect, and the "bad faith" aspect of union representatives' conduct in determining the breach of their duty of fair representation, as opposed to the single "arbitrary" analysis followed in only half the circuits and the Ninth Circuit.

PARTIES TO THE PROCEEDING

Petitioners are: Michael A. Wills, an individual, and Robert Thurlwell, an individual.

Respondents are: Walt Disney Pictures and Television, Inc., a corporation, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local #727 (Motion Picture Craft Services), an organization.

STATEMENT OF CORPORATE DISCLOSURE

Walt Disney Company, which is the ultimate parent company of Walt Disney Pictures and Television, Inc., has issued shares to the public. Also, Walt Disney Company owns a minority interest in a French entity, Euro Disney S.C.A., which has issued shares traded in the United States.

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OTHER AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Michael Wills and Robert Thurlwell, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (December 17, 1998).

OPINIONS BELOW

The opinions below were unpublished. The opinions of the Ninth Circuit are reproduced in Appendices 1 and 2 to this petition, and the opinions of Federal District Court for the Central District of California are reproduced in Appendix 4 of this petition. The opinion of the Ninth Circuit reversed in part and affirmed in part a summary judgment granted by the Federal District Court for the Central District of California. (App. 4.)

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals which forms the basis of this petition for Writ of Certiorari was entered on *December 17, 1998*. (App. 1.) Said decision, was an amended opinion of the court entered after a petition for rehearing. The original decision was entered on *November 13, 1998* (App. 2.) and a further order correcting the omission of the dissent in the amended decision was entered on *December 24, 1998*. (App. 3.)

United States Supreme Court has jurisdiction to review this case on petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

29 U.S.C. § 185 provides in part:

> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> **(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

STATEMENT OF THE CASE

This Petition maintains that the Ninth Circuit and District Court erred in failing to consider the claims of Michael A. Wills and Robert Thurlwell that their union acted in bad faith and discriminatory manner when their exclusive representative began lying about the status and processing of grievance claims they submitted against their employer. The representative subsequently abandoned several of said grievance claims after Messrs. Wills and Thurlwell contacted outside counsel to look into the matter.

The underlying action is based on the violations of Section 301 of the Labor Management Relations Act. (29 U.S.C. § 185.)

Michael Wills and Robert Thurlwell, Petitioners, are members of the crafts services union in the entertainment industry. Their union is charged with numerous services on the set of a motion picture production. Among such services are moving walls, cleaning stages, assisting special effects technicians, assisting lighting technicians in preparing set lighting, assisting sound technicians in moving sound equipment, assisting camera operators by laying cable and positioning monitors, preparing set stages for scenes, and assisting set decorators. These duties as described in the collective bargaining agreement require the crafts services person to be on the set before every other person, and to leave long after every other person has left.

The collective bargaining agreement also provided for the establishment of a seniority roster at Walt Disney Pictures and Television, Inc., "WDPT". Crafts services

employees who were on the seniority roster were entitled to preferences of employment on WDPT motion pictures pursuant to Paragraphs 16 and 68 of Collective Bargaining Agreement.[1] Petitioners were the only active members of the crafts service union who were on the seniority roster. Petitioner Thurlwell was on the roster by virtue of his employment at WDPT since April 1965, and Petitioner Wills, by employment as of 1982.

In or about 1994, WDPT stopped employing or offering employment to Petitioners in accordance with paragraph 68 of the Collective Bargaining Agreement, the

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[1] Section II, Paragraph 16, provides:

> In filing positions subject to this Agreement which may be vacated or created from time to time, the Producer will give preference to the then currently-employed employees on Producer's Studio Experience Roster or to anyone on the Industry Experience Roster who, in the Producer's opinion, is qualified to fill such position.

Section VII, Paragraph 68 provides:

> Except as provided in Paragraph 68(b)(2) of the 1988 Local #727 Agreement, Producer has established and will maintain a Studio Seniority Roster (sometimes referred to in this subparagraph as "Studio Roster" or "Seniority Roster"); said Studio Roster shall be composed of those employees who were on the Studio Seniority Roster at the signing of this Agreement between the parties hereto. The number of slots available on the Studio Seniority Roster shall be that number in existence on August 1, 1985. An employee who is removed from the Studio Seniority Roster shall not be replaced and no further additions to the Studio Roster will be made.

seniority clause. WDPT claimed that motion pictures produced under the labels, "Touchstone Pictures", "Caravan Pictures", and "Hollywood Pictures" were not subject to the collective bargaining agreement. Furthermore, WDPT maintained that Petitioners were not available during the productions of motion pictures distributed under the "Disney" label. Petitioners claimed that said labels were marketing divisions of WDPT, all subject to the collective bargaining agreement.[2]

Also in 1994, while unemployed and reporting to WDPT for assignments, Michael Wills learned from a union driver that a Disney Picture titled "In the Army Now" was under production. Mr. Wills determined that no one on Local #727 had been offered, or hired for, the crafts service position on "In the Army Now". Therefore, he contacted the union representative, Pamela Mack, "Mack", and reported the violation. He requested that the grievance be filed on his behalf and on behalf of Robert Thurlwell, the only other active member of Local #727 on the seniority roster.

Mack agreed to file a Step One grievance. Several weeks passed, and Mr. Wills contacted Ms. Mack and inquired about the grievance complaint he had requested on "In the Army Now". Ms. Mack informed him that she was pursuing the grievance and had processed it through the first stages. Several additional weeks passed and Mr. Wills inquired again about the grievance complaint. This time Mack informed him that the matter had been sent to

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[2] The question, whether the aforementioned labels were subject to the collective bargaining agreement was never reached by the Ninth Circuit.

arbitration and the arbitrator had ruled in their favor. According to Ms. Mack, both Mr. Wills and Mr. Thurlwell were to receive compensation in accordance with the arbitration ruling, to wit, the sum of the award was to equal the compensation paid to the crafts service person on "In the Army Now". Neither, Mr. Wills nor Mr. Thurlwell were notified of the date of the arbitration, the time of the hearing or the names of the members of the panel of arbitrators.

While the grievance on "In the Army Now" was being processed, WDPT continued to violate the collective bargaining agreement's seniority clause. Among the films then under production in 1994 and in violation of the seniority clause were "Crimson Tide," "Dead Presidents," "Dangerous Minds," "The Scarlet Letter," "Low Down Dirty Shame," "Father of the Bride II," "Mr. Wrong," "Phenomenon," "Mighty Ducks, III," "The Rock," "First Kid," "Puppet Masters," "Up Close and Personal," "Houseguest," and still more. Mr. Wills and Mr. Thurlwell filed additional grievances with Mack.

However, when Petitioners were told about the arbitration award, and because of the unusual procedure in which it had transpired, they contacted private counsel to inquire into the matter. Their counsel then contacted Mack. On learning that Petitioners had retained counsel, Mack abandoned all subsequent grievances filed by Petitioners, and even refused to process Petitioner Thurlwell's complaint when he was subsequently discharged

by WDPT.[3] Even while failing to file certain grievances and still abandoning others, Mack continued to inform Petitioners that she was processing their grievances through the various stages delineated in the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT

In this case, the Ninth Circuit Court of Appeals departed from the standard enunciated in *Vaca v. Sipes* [386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967)] and *Air Line Pilots Ass'n, Intern. v. O'Neill* [499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991)] and followed in the Seventh Circuit, Fifth Circuit, and the Tenth Circuit Courts of Appeals for determining whether the conduct of a union representative breached the duty of fair representation in instances of her dishonesty.

Three of the aforementioned circuits have clearly established that the determination of the duty of fair representation must consider and analyze the conduct questioned, in several independent lights: First, whether the conduct was arbitrary; second, whether the conduct was discriminatory; and third, in bad faith. (*Crider v. Spectrulite Consortium, Inc.* 130 F.3d 1238 (7th Cir. 1997); *Tedford v. Peabody Coal Co.*, 553 F.2d 952, 957 (5th Cir. 1976); *Aguinaga v. United Food and Commercial Workers*

[3] The Ninth Circuit reversed the district court's decision granting summary judgment on the issues pertaining to Thurlwell's discharge. Said issue is not part of this Petition.

Intern. Union, 993 F.3d 1463 (10th Cir. 1993), cert. denied 510 U.S. 1072, 114 S.Ct. 880, 127 L.Ed.2d 75.)

> "Arbitrary," "discriminatory," and "bad faith" are three separate parts of the fair representation test, and each must be analyzed individually.

(*Crider v. Spectrulite Consortium, Inc.*, supra, 130 F.3d at 1243, citing *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293 (7th. Cir. 1992).)

However, the Ninth Circuit, and still other circuits continue to hold that a determination finding that the conduct was not arbitrary negated further inquiry into the alleged breach of the duty. In doing so, these Circuits have clothed union representatives in parts of the country, and in largely dishonest union managements, with a kind of immunity from accountability and prosecution, at the expense of individual rights of lowly union members. While the Ninth Circuit line of cases mention, in passing, the language in *Vaca v. Sipes*, supra, regarding "honesty", their remarks in this regard are superfluous when considered in the light of the body of their decisions on this issue. It says nothing for substance.

In this case, the Ninth Circuit wrote:

> Only when a union shows " an egregious disregard" for the rights of its members is it liable for a breach of duty of fair representation. *See Stevens*, 18 F.3d at 1448; *Peters v. Burlington Northern R.R. Co.*, 931 F.2d 534, 538 (9th Cir. 1990). . . . The union's decision not to pursue Wills' grievance as to the initial assignment of craft service positions for "In the Army Now" had a "rational basis,"

> *Stevens*,[4] 18 F.3d at 1448, and therefore did not amount to a breach of the duty of fair representation.

(Memorandum Decision at p.3.)

The Ninth Circuit took the aforementioned position, notwithstanding that the entire body of facts before it as to the failure to process the particular grievances being addressed in the decision pointed substantially to dishonesty and bad faith.

Petitioners reported to their union that they had been denied employment by Walt Disney Pictures and Television, Inc., "WDPT," on a motion picture entitled, "In the Army Now," as required by the collective bargaining agreement. The union representative, Pamela Mack, obviously agreeing with the members, filed a Step One grievance. However, on filing a Step Two grievance, she received a reply which stated:

> The elapsed time from your receipt of the response and your request for Step Two hearing was twenty-four days.
>
> Since the Article 7, Step Two procedures stipulate a maximum of 15 days to present your request, I am forced to deny it due to its lack of timeliness. . . .

(Excerpts of Record, "ER", p.1284.)

Shortly after receiving the foregoing reply, Mack lied to Petitioners that their grievance had proceeded to arbitration and the arbitrator had awarded a sum of $400.00

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[4] *Stevens v. Moor Business Forms, Inc.*, 18 F.3d 1443 (9th Cir. 1994).

in their favor. Mack also informed them that she was still pursuing the matter on their behalf despite the award.

Suspicious of their representative's claim, Petitioners contacted counsel, and as a result of counsel informing Mack that he had been retained, the union abandoned subsequent claims by Petitioners or perfunctorily addressed those claims.[5]

The Ninth Circuit only had this to say about the "In the Army Now" grievance:

> In her deposition, Mack testified that after production on "In the Army Now" had begun, WDPT employed a second less senior employee. Apparently, this position was filled at a time when either or both Wills and Thurlwell were "available" for employment. Accordingly, Mack pursued Wills' grievance with respect to the employee further. Indeed, she secured settlement in which Wills and Thurlwell were awarded approximately $400.00 each. Although Mack may have underestimated the number of less senior employees who worked on "In the Army Now," and although the settlement may have been inadequate, her conduct was, at worst, negligent.

(Memorandum Decision at p.3. Appendix 1.)

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[5] The Ninth Circuit decision reversed part of the summary judgment order because the panel found that there was clearly a dispute of fact on one of the claims abandoned after Petitioners retained counsel.

The issue was never negligence. Moreover, in fair representation cases, negligence is not necessarily mutually exclusive of bad faith and dishonesty, but of "arbitrariness".

WDPT's deposition clearly established that there was no attempt to estimate the amount paid to whom ever was employed in place of Petitioners for "In the Army Now". According to WDPT, the amount of the settlement was a nuisance offered because the claim had completely lost merit by the failure of Mack to file a timely grievance.

> Q. Do you recall – do you know how the amount stated on the check was determined?
>
> A. Arbitrarily. It was an agreement negotiated between two parties and divided between two individuals. It was proposed by the company and the Union, so I can't speak for the Union's perception.
>
> Q. What was the company's position?
>
> A. It was a nuisance settlement.[6]

(ER p.1514, Deposition of WDPT's Vice President of Labor Relations)

We acknowledge the Ninth Circuit's comments at footnote 3 of its decision, to wit:

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[6] The Union could never have been able to "estimate" how much was paid to anybody on "In the Army Now" without WDPT providing that information to the Union.

> Appellants have also failed to show that the union's acceptance of the settlement was "discriminatory" or in "bad faith."

(Memorandum Decision, p.4. Appendix 1.)

However, such conclusion illustrates the fallacy of the Ninth Circuit's analysis. First, it was not just the "acceptance of the settlement" which was ever intended to show the bad faith conduct. It was the lying which preceded the acceptance and tried to mask the reasons behind the acceptance; it was the subsequent lies on other grievances, also the basis of this action, which followed after Petitioners retained counsel; it was the failure to disclose that the union was unable to pursue the grievance on "In the Army Now" because WDPT claimed that the time elapsed had exceeded fifteen (15) days.[7]

Secondly, the relegation of the analysis which purportedly addresses "bad faith" and "discriminatory" aspects of the standard to a three-line footnote confirms the circuit's departure from accepted modes of determining the breach of a union's duty of fair representation.

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[7] Petitioner Robert Thurlwell had been a union member for thirty years at the relevant time, and had he known that WDPT was taking this position, he would have been able to prove to an arbitrator that established custom and practice between the union and WDPT never followed the alleged time lines. More importantly, Mack may then not have retaliated by abandoning other grievances or continued to lie about them. Pamela Mack had only been a member of the union for about three years. (Appendix 7.) Petitioner Michael Wills had been a member of the union for thirteen years at the relevant time.

These aspects of the standard deserve the same weight and importance of analysis as did the "arbitrariness" aspect. See for instance, the Seventh Circuit's analysis in *Ooley v. Schwitzer Div., Household Mfg. Inc.*, supra, [961 F.2d 1293] and *McKelvin v. E.J. Brach Corp.* [124 F.3d 864 (7th Cir. 1997)] or the Tenth Circuit's analysis in *Aguinaga v. United Food and Commercial Workers Intern. Union*, supra, [993 F.3d 1463, 1470]. By contrast, the Ninth Circuit's approach is almost arbitrary.

Such arbitrariness ensures the dishonesty of union representatives by encouraging Federal District Courts to grant summary judgments on issues where there are clear disputes of fact as to bad faith and discrimination. This is so because the breach of the duty of fair representations continues to be the most prevalent of labor law disputes in the dockets of Federal Courts. (Merlin, *The Supreme Court and the Duty of Fair Representation*, 27 Harv. Civ. Rights – Civil Liberties Law Rev., 127, 128, n.5, (1992); Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 128, 128-9 (1985)).

CONCLUSION

In the end, the individual and individual rights are made expendable by the very statute intended to ensure their protection from abuse and domination.

Wherefore, Petitioners pray that this Court grant certiorari to review the order of the Ninth Circuit Court of Appeals.

Date: March 13, 1999

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. WILLS; ROBERT THURLWELL, Plaintiffs-Appellants, v. WALT DISNEY PICTURES AND TELEVISION; WAYNE METCLAF, ROGER SHOOK, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 727, Defendants-Appellees.	No. 97-55420 D.C. No. CV-95-5716-JMI (VAPx) **AMENDED MEMORANDUM*** (Filed Dec. 17, 1998)

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted November 2, 1998
Pasadena, California

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: BRIGHT,** REINHARDT, and RYMER, Circuit Judges.

Appellants Michael Wills and Robert Thurlwell were craft service workers at Walt Disney Pictures and Television, Inc. (WDPT) and senior members of the International Alliance of Theatrical Stage and Motion Picture Machine Operators, Local 727. They allege that WDPT employed less senior craft services workers in violation of the collective bargaining agreement. The appellants also argue that the union unfairly represented them in their dispute with the employer over this matter. Appellants further claim that the union breached its duty of fair representation by not pursuing a grievance related to Thurlwell's termination. The district court granted summary judgment to the union and WDPT on all of appellants' claims.

I. Seniority Grievances

To establish that a union breached its duty of fair representation, an employee must show that the union's conduct toward him was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (*quoted in Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1034, 1037 (1997)). A union's conduct is arbitrary "only if it lacks a rational basis." *Stevens v. Moore Business Forms*, 18 F.3d 1443, 1447 (9th Cir.1994). It is well settled, moreover, that "[a] union's conduct may not be deemed arbitrary 'simply because of an error in . . . interpreting particular

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**The Honorable Myron Bright, United States Court of Appeals for the Eighth Circuit, sitting by designation.

provisions of a collective bargaining agreement.' " *Stevens*, 18 F.3d at 1447-48 (*quoting Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir.1985)). Only when a union shows "an egregious disregard" for the rights of its members is it liable for a breach of the duty of fair representation. *See Stevens*, 18 F.3d at 1448; *Peters v. Burlington Northern R.R. Co.*, 931 F.2d 534, 538 (9th Cir.1990).

Wills submitted a grievance to the union business agent, Pamela Mack, alleging that WDPT had employed less senior crafts services employees for the production of "In the Army Now" and had thereby violated Article 68 of the collective bargaining agreement.[1] Mack filed a grievance on Wills' behalf, and conducted an investigation of Wills' claim. After speaking to Wayne Metcalf, Walt Disney's Vice President of Labor Relations, reviewing payroll records, and discussing the question with a representative of the International Union, Mack determined that the grievance was without merit because Wills was "unavailable" for work at the time that craft service positions were initially filled for "In the Army Now." It is also clear that appellant Thurlwell was employed on another WDPT production at the time the positions were initially filled. The union's decision not to pursue Wills' grievance as to the initial assignment of craft service positions for "In the Army Now" had a "rational basis,"

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[1] We hold that appellants claim regarding the "In the Army Now" grievance is not barred by the sixth-month statute of limitations. *See, e.g., DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 154-55 (1983); *Stone v. Writers Guild*, 101 F.3d 1312, 1314-15 (9th Cir.1996)

Stevens, 18 F.3d at 1448, and therefore did not amount to a breach of the duty of fair representation.

In her deposition, Mack testified that after production on "In the Army Now" had begun, WDPT employed a second less senior employee. Apparently, this position was filled at a time when either or both Wills and Thurlwell were "available" for employment. Accordingly, Mack pursued Wills' grievance with respect to this employee further. Indeed, she secured a settlement in which Wills and Thurlwell were awarded approximately $400 each.[2] Although Mack may have underestimated the number of less senior employees who worked on "In the Army Now," and although the settlement may have been inadequate, her conduct was, at worst, negligent. Mere negligent conduct on the part of a union, however, does not constitute a breach of the duty of fair representation. *See Stevens*, 18 F.3d at 1447.[3] Therefore, the district court's grant of summary judgment to the union was not in error.

In a workplace governed by a collective bargaining agreement, an employee may only maintain a cause of action for breach of that agreement against his employer if he first demonstrates that the union failed in its duty to provide fair representation. *See, e.g., Vaca*, 386 U.S. at 186; *Stevens*, 18 F.3d at 1447. Because the plaintiffs failed to raise a triable issue as to whether the union breached its

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[2] In general, "[u]nions are free to negotiate and accept settlements even without the grievant's approval." *Shane v. Greyhound Bus Lines, Inc.*, 868 F.2d 1057, 1061 (1989).

[3] Appellants have also failed to show that the union's acceptance of the settlement was "discriminatory" or in "bad faith." *Stevens*, 18 F.3d at 1447.

duty of fair representation in handling the "In the Army Now" grievance, the district court was also correct in granting summary judgment to the employer as to this claim. *See, e.g., Johnson v. United States Postal Service*, 756 F.2d 1461, 1467 (9th Cir.1985) ("[A] cause of action for breach of a collective bargaining agreement may not be maintained if the union provided fair representation.").

Appellants argue that even if Wills and Thurlwell were unavailable when the craft services positions were filled, there is a dispute of fact as to whether they were entitled to employment on the films "as a matter of promotion." The union contends that work on the production of these movies does not constitute a promotion under the collective bargaining agreement. It further contends that the collective bargaining agreement does not mandate that employees on the Studio Seniority Roster receive preference for promotions. The appellants contest this interpretation. Even if the appellants were correct that the union had misinterpreted the agreement, however, they would not succeed in showing a breach of the duty of fair representation. *See, e.g., Stevens*, 18 F.3d at 1447-48. Accordingly, summary judgment on this claim was justified as well.

Appellants' claims regarding all other films, including "Mr. Wrong," "Crimson Tide," "Father of the Bride II," "The Rock," "Nothing to Lose," "Phenomenon," are without merit, and simply reflect additional disagreements as to contractual obligations under the terms of the collective bargaining agreement.[4]

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[4] On appeal, the appellants have not raised any claims against the individual defendants. These claims are therefore

II. Resignation Claim

Thurlwell has worked continuously at Walt Disney since 1965. A genuine issue of material fact exists as to whether he resigned or was terminated after thirty years of service. Sometime in 1995, he was offered a craft services position on the Fox television program "90210." According to Thurlwell's testimony, he secured permission from the head of Disney's Craft Services Department to take an authorized leave of absence for the duration of his employment with Fox. Nonetheless, in July 1995, Thurlwell received a letter from Disney's Director of Production Services, Roger Shook, constructively discharging him from his job and severing his seniority.

According to Thurlwell's deposition testimony, one or two days after receiving this letter he wrote to Wayne Metcalf, Disney's Director of Labor Relations, to complain that he had not in fact resigned. Shortly after receiving the Shook letter, Thurlwell also spoke to David Collier, the Union President, about the letter. Collier told Thurlwell that he would relay Thurlwell's complaint to Mack. Thurlwell spoke to Mack and was told that one of the union's attorneys would contact Disney on Thurlwell's behalf.

According to Thurlwell's deposition and Mack's own deposition, the union attorney never followed up on this request. After not hearing back from the union for several weeks, Thurlwell sent a letter to Mack explaining in writing his position on the Shook letter. He explained that

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abandoned. *See, e.g., Dilley v. Gunn*, 64 F.3d 1365, 1367-68 (9th Cir.1995). We note that, in any event, these claims lack merit.

he had neither quit nor resigned. In his Declaration submitted to the district court, Thurlwell reiterated his position that he had neither quit nor resigned from Disney, and that he had been authorized to take a leave of absence in order to work on "90210." Thurlwell also alleged explicitly that he had requested that the union file a grievance on his behalf.

It is undisputed that the union never filed such a grievance. On appeal, the appellees claim that the union's decision not to pursue the grievance was based in part on Thurlwell's unwillingness to cooperate with Mack's investigation. When Mack phoned Thurlwell to question him about the grievance, however, Thurlwell returned her call and was told that the matter had been forwarded to the Union's attorney. The record before us does not show that the union attorney ever called Thurlwell. It is also undisputed that Thurlwell wrote to Mack and explained the basis of his claim. Mack alleges that after receiving Thurlwell's letter, she left "two messages" for him, and that Thurlwell failed to respond to the calls and to a letter she wrote him asking him to call. Thurlwell argues that by that time Mack was fully aware of his position and had, as noted earlier, turned the matter over to the union attorney. Viewing the evidence in the light most favorable to Thurlwell, there is at least a genuine issue of material fact as to whether Thurlwell's alleged lack of cooperation excuses the union's failure to file a grievance.[5]

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[5] The union also argues that because Thurlwell and Wills had retained an outside attorney before Thurlwell sent his letter to Mack, and because Thurlwell had filed his lawsuit the day

The appellees further claim that the union's decision not to file a grievance was also based on its determination that Thurlwell had either resigned voluntarily or taken an unauthorized leave of absence. The record, however, does not support this assertion. Mack's deposition testimony makes it clear that she simply did not know whether or not Thurlwell had resigned voluntarily or taken an unauthorized leave of absence, and therefore that Mack did not know whether or not a grievance might be meritorious. Mack was asked why she didn't pursue Thurlwell's complaint through a formal grievance, and she responded "basically, I wasn't sure how to handle it, *only because I didn't know if he left.*"

A union acts arbitrarily, and thereby breaches its duty of fair representation, when its decision not to pursue a grievance is made without a rational basis. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Stevens*, 18 F.3d at 1447. The evidence, viewed in the light most favorable to Thurlwell raises a genuine issue of fact as to whether the union's decision not to pursue his grievance lacked a

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before the letter was sent, the union had no duty to pursue the grievance. This is not correct. Before the suit was filed Thurlwell had contacted Collier – his Union president, Mack, and Disney's director of Labor Relations, and had complained to each of Shook's letter. Although the union told Thurlwell that one of its attorneys would pursue the issue, this apparently never happened. Several weeks after Thurlwell's initial complaints were lodged with Collier and Mack, Thurlwell took independent action to protect his rights. We know of neither authority nor reason that suggests that such action precludes a union from fulfilling its contractual obligation to initiate the grievance and thus to moot or abate the lawsuit.

rational basis. We hold, therefore, that summary judgment was improper as to the claim involving Thurlwell's resignation.

Appellants' claim that the magistrate judge erred in quashing their subpoena to Creative Artists Agency is barred by F.R. Civ. Pro. 72(a). Appellants' claim regarding the district court's denial of their motion to amend the First Amended Complaint is without merit because the age discrimination claims were not exhausted. Finally, we find no merit to the appeal from the district court's denial of appellants' motion to reopen discovery.

III. Conclusion

The district court's order is AFFIRMED in all respects except as to appellants' claim that, with respect to Thurlwell's purported resignation, the union breached its duty of fair representation and Walt Disney breached the collective bargaining agreement. The district court's grant of summary judgment on that claim is REVERSED, and the case is remanded for trial.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL A. WILLS; ROBERT THURLWELL, Plaintiffs-Appellants, v. WALT DISNEY PICTURES AND TELEVISION; WAYNE METCLAF, ROGER SHOOK and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 727, Defendants-Appellees.	No. 97-55420 D.C. No. CV-95-5716-JMI (VAPx) **MEMORANDUM*** (Filed Nov. 13, 1998)

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted November 2, 1998
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: BRIGHT,** REINHARDT, and RYMER, Circuit Judges.

Appellants Michael Wills and Robert Thurlwell were craft service workers at Walt Disney Pictures and Television, Inc. (WDPT) and senior members of the International Alliance of Theatrical Stage and Motion Picture Machine Operators, Local 727. They allege that WDPT employed less senior craft services workers in violation of the collective bargaining agreement. The appellants also argue that the union unfairly represented them in their dispute with the employer over this matter. Appellants further claim that the union breached its duty of fair representation by not pursuing a grievance related to Thurlwell's termination. The district court granted summary judgment to the union and WDPT on all of appellants' claims.

I. Seniority Grievances

To establish that a union breached its duty of fair representation, an employee must show that the union's conduct toward him was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (*quoted in Marguez v. Screen Actors Guild, Inc.*, 124 F.3d 1034, 1037 (1997)). A union's conduct is arbitrary "only if it lacks a rational basis." *Stevens v. Moore Business Forms* 18 F.3d 1443, 1447 (9th Cir. 1994). It is well settled, moreover, that "[a] union's conduct may not be deemed arbitrary 'simply because of an error in . . . interpreting particular

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** The Honorable Myron Bright, United States Court of Appeals for the Eighth Circuit, sitting by designation.

provisions of a collective bargaining agreement.' " *Stevens*, 18 F.3d at 1447-48 (*quoting Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985)). Only when a union shows "an egregious disregard" for the rights of its members is it liable for a breach of the duty of fair representation. *See Stevens*, 18 F.3d at 1448; *Peters v. Burlington Northern R.R. Co.*, 931 F.2d 534, 538 (9th Cir. 1990).

Wills submitted a grievance to the union business agent, Pamela Mack, alleging that WDPT had employed less senior crafts services employees for the production of "In the Army Now" and had thereby violated Article 68 of the collective bargaining agreement.[1] Mack filed a grievance on Wills' behalf, and conducted an investigation of Wills' claim. After speaking to Wayne Metcalf, Walt Disney's Vice President of Labor Relations, reviewing payroll records, and discussing the question with a representative of the International Union, Mack determined that the grievance was without merit because Wills was "unavailable" for work at the time that craft service positions were initially filled for "In the Army Now." It is also clear that appellant Thurlwell was employed on another WDPT production at the time the positions were initially filled. The union's decision not to pursue Wills' grievance as to the initial assignment of craft service positions for "In the Army Now" had a "rational basis,"

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[1] We hold that appellants claim regarding the "In the Army Now" grievance is not barred by the sixth-month statute of limitations. *See, e.g., DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 154-55 (1983); *Stone v. Writers Guild*, 101 F.3d 1312, 1314-15 (9th Cir. 1996).

Stevens, 18 F.3d at 1448, and therefore did not amount to a breach of the duty of fair representation.

In her deposition, Mack testified that after production on "In the Army Now" had begun, WDPT employed a second less senior employee. Apparently, this position was filled at a time when either or both Wills and Thurlwell were "available" for employment. Accordingly, Mack pursued Wills' grievance with respect to this employee further. Indeed, she secured a settlement in which Wills and Thurlwell were awarded approximately $400 each.[2] Although Mack may have underestimated the number of less senior employees who worked on "In the Army Now," and although the settlement may have been inadequate, her conduct was, at worst, negligent. Mere negligent conduct on the part of a union, however, does not constitute a breach of the duty of fair representation. *See Stevens*, 18 F.3d at 1447.[3] Therefore, the district court's grant of summary judgment to the union was not in error.

In a workplace governed by a collective bargaining agreement, an employee may only maintain a cause of action for breach of that agreement against his employer if he first demonstrates that the union failed in its duty to provide fair representation. *See, e.g., Vaca*, 386 U.S. at 186; *Stevens*, 18 F.3d at 1447. Because the plaintiffs failed to raise a triable issue as to whether the union breached its

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[2] In general, "[u]nions are free to negotiate and accept settlements even without the grievant's approval." *Shane v. Greyhound Bus Lines, Inc.*, 868 F.2d 1057, 1061 (1989).

[3] Appellants have also failed to show that the union's acceptance of the settlement was "discriminatory" or in "bad faith." *Stevens*, 18 F.3d at 1447.

duty of fair representation in handling the "In the Army Now" grievance, the district court was also correct in granting summary judgment to the employer as to this claim. *See, e.g., Johnson v. United States Postal Service*, 756 F.2d 1461, 1467 (9th Cir. 1985) ("[A] cause of action for breach of a collective bargaining agreement may not be maintained if the union provided fair representation.").

Appellants argue that even if Wills and Thurlwell were unavailable when the craft services positions were filled, there is a dispute of fact as to whether they were entitled to employment on the films "as a matter of promotion." The union contends that work on the production of these movies does not constitute a promotion under the collective bargaining agreement. It further contends that the collective bargaining agreement does not mandate that employees on the Studio Seniority Roster receive preference for promotions. The appellants contest this interpretation. Even if the appellants were correct that the union had misinterpreted the agreement, however, they would not succeed in showing a breach of the duty of fair representation. *See, e.g., Stevens*, 18 F.3d at 1447-48. Accordingly, summary judgment on this claim was justified as well.

Appellants' claims regarding all other films, including "Mr. Wrong," "Crimson Tide," "Father of the Bride II," "The Rock," "Nothing to Lose," "Phenomenon," are without merit, and simply reflect additional disagreements as to contractual obligations under the terms of the collective bargaining agreement.[4]

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[4] On appeal, the appellants have not raised any claims against the individual defendants. These claims are therefore

II. Resignation Claim

Thurlwell has worked continuously at Walt Disney since 1965. Sometime in 1995, he was offered a craft services position on the Fox television program "90210." According to Thurlwell's testimony, he secured permission from the head of Disney's Craft Services Department to take an authorized leave of absence for the duration of his employment with Fox. Nonetheless, in July 1995, Thurlwell received a letter from Disney's Director of Production Services, Roger Shook, constructively discharging him from his job and severing his seniority.

According to Thurlwell's deposition testimony, one or two days after receiving this letter he wrote to Wayne Metcalf, Disney's Director of Labor Relations, to complain that he had not in fact resigned. Shortly after receiving the Shook letter, Thurlwell also spoke to David Collier, the Union President, about the letter. Collier told Thurlwell that he would relay Thurlwell's a complaint to Mack. Thurlwell spoke to Mack and was told that one of the union's attorneys would contact Disney on Thurlwell's behalf.

According to Thurlwell's deposition and Mack's own deposition, the union attorney never followed up on this request. After not hearing back from the union for several weeks, Thurlwell sent a letter to Mack explaining in writing his position on the Shook letter. He explained that

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abandoned. *See, e.g., Dilley v. Gunn*, 64 F.3d 1365, 1367-68 (9th Cir. 1995). We note that in any event, these claims lack merit.

he had neither quit nor resigned. In his Declaration submitted to the district court, Thurlwell reiterated his position that he had neither quit nor resigned from Disney, and that he had been authorized to take a leave of absence in order to work on "90210." Thurlwell also alleged explicitly that he had requested that the union file a grievance on his behalf.

It is undisputed that the union never filed such a grievance. On appeal, the appellees claim that the union's decision not to pursue the grievance was based in part on Thurlwell's unwillingness to cooperate with Mack's investigation. When Mack phoned Thurlwell to question him about the grievance, however, Thurlwell returned her call and was told that the matter had been forwarded to the Union's attorney. The record before us does not show that the union attorney ever called Thurlwell. It is also undisputed that Thurlwell wrote to Mack and explained the basis of his claim. Mack alleges that after receiving Thurlwell's letter, she left "two messages" for him, and that Thurlwell failed to respond to the calls and to a letter she wrote him asking him to call. Thurlwell argues that by that time Mack was fully aware of his position and had, as noted earlier, turned the matter over to the union attorney. Viewing the evidence in the light most favorable to Thurlwell, there is at least a genuine issue of material fact as to whether Thurlwell's alleged lack of cooperation excuses the union's failure to file a grievance.[5]

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[5] The union also argues that because Thurlwell and Wills had retained an outside attorney before Thurlwell sent his letter to Mack, and because Thurlwell had filed his lawsuit the day

The appellees further claim that the union's decision not to file a grievance was also based on its determination that Thurlwell had either resigned voluntarily or taken an unauthorized leave of absence. The record, however, does not support this assertion. Mack's deposition testimony makes it clear that she simply did not know whether or not Thurlwell had resigned voluntarily or taken an unauthorized leave of absence, and therefore that Mack did not know whether or not a grievance might be meritorious. Mack was asked why she didn't pursue Thurlwell's complaint through a formal grievance, and she responded "basically, I wasn't sure how to handle it, *only because I didn't know if he left.*"

A union acts arbitrarily, and thereby breaches its duty of fair representation, when its decision not to pursue a grievance is made without a rational basis. *See, e.g., Vaca v. Sipes,* 386 U.S. 171, 190 (1967); *Stevens,* 18 F.3d at 1447. The evidence, viewed in the light most favorable to Thurlwell raises a genuine issue of fact as to whether the union's decision not to pursue his grievance lacked a

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before the letter was sent, the union had no duty to pursue the grievance. This is not correct. Before the suit was filed Thurlwell had contacted Collier – his Union president, Mack, and Disney's director of Labor Relations, and had complained to each of Shook's letter. Although the union told Thurlwell that one of its attorneys would pursue the issue, this apparently never happened. Several weeks after Thurlwell's initial complaints were lodged with Collier and Mack, Thurlwell took independent action to protect his rights. We know of neither authority nor reason that suggests that such action precludes a union from fulfilling its contractual obligation to initiate the grievance and thus to moot or abate the lawsuit.

rational basis. We hold, therefore, that summary judgment was improper as to the claim involving Thurlwell's resignation.

Appellants' claim that the magistrate judge erred in quashing their subpoena to Creative Artists Agency is barred by F. R. Civ. Pro. 72(a). Appellants' claim regarding the district court's denial of their motion to amend the First Amended Complaint is without merit because the age discrimination claims were not exhausted. Finally, we find no merit to the appeal from the district court's denial of appellants' motion to reopen discovery.

III. Conclusion

The district court's order is AFFIRMED in all respects except as to appellants' claim that, with respect to Thurlwell's purported resignation, the union breached its duty of fair representation and Walt Disney breached the collective bargaining agreement. The district court's grant of summary judgment on that claim is REVERSED, and the case is remanded for trial.

Wills v. Walt Disney Pictures and Television No. 97-55420 (Filed Nov. 13, 1998)

RYMER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part I but disagree that summary judgment on Thurlwell's resignation claim should be reversed.

It is undisputed that Thurlwell left Disney after 30 years to work for Fox on the season-long production of the television show "Beverly Hills 90210," without responding to advice from Walter Shook, Disney's Director of Production Services, that leaving was a resignation. It is also undisputed that Thurlwell failed to respond to Mack's calls for information. Instead, he filed suit. Having failed to provide help that would allow the Union to prepare a grievance, Thurlwell failed to exhaust the grievance process. *See, e.g., Stupy v. United States Postal Service*, 951 F.2d 1079, 1082 (9th Cir. 1991) ("[i]t is axiomatic that an aggrieved employee must exhaust any exclusive grievance and arbitration procedure created in a collective bargaining agreement prior to bringing a . . . suit against the employer"); *see also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). Mack's statement that she didn't file a formal grievance "because [she] didn't know if he left" is consistent with Thurlwell's failure to cooperate, for without his input she could not know whether a grievance might be meritorious. Given what the Union knew about his departure, and since Thurlwell chose to litigate rather than cooperate, I cannot see how any triable issue is raised as to whether it was arbitrary for the grievance to be handled as it was. There could be no breach of the Union's duty of fair representation under these circumstances. Therefore, I would affirm.

APPENDIX 3

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. WILLS; ROBERT THURLWELL, Plaintiffs-Appellants, vs. WALT DISNEY PICTURES AND TELEVISION; WAYNE METCALF, ROGER SHOOK, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 727 Defendants-Appellees.	CA No. 97-55420 DC No. CV-95-5716-JMI (Filed Dec 24, 1998) ORDER

Before: BRIGHT*, REINHARDT, and RYMER, Circuit Judges.

Judge Rymer's partial concurrence partial dissent was inadvertently omitted from the amended memorandum filed on December 17, 1998. It remains in effect.

*The Honorable Myron Bright, United States Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. WILLS, et al., Plaintiffs, v. WALT DISNEY PICTURES AND TELEVISION, INC., et al., Defendants.	CV 95-5716 JMI (VAPx) **ORDER DENYING PLAINTIFFS' MOTION TO FILE A SECOND AMENDED COMPLAINT** **ORDER DENYING REQUEST FOR SANCTIONS** **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** (Filed Mar. 5, 1997)

IT IS HEREBY ORDERED:

Motion for Summary Judgment by Defendants Walt Disney Pictures and Television, Inc., Wayne Metcalf, and Roger Shook ("Disney Defendants") came before this Court on March 3, 1997. Defendant International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local # 727 ("Local 727") also submitted a Motion for Summary Judgment. After careful review and consideration, both motions are hereby GRANTED. Plaintiff's Motion to File an Amended Complaint is hereby DENIED. Defendant Local 727's Request for Sanctions is also DENIED.

I. BACKGROUND

Plaintiffs were employees of Walt Disney Pictures and Television, Inc. ("Disney") and are members of Local 727. Plaintiffs perform catering "craft" services and labor work on motion pictures and television productions.

Disney and Local 727 maintain a collective bargaining agreement ("CBA"). Pursuant to the CBA, Plaintiffs were put on a Studio Seniority Roster, entitling them to a right of first refusal for relevant work. Plaintiffs contend that the Disney Defendants violated the CBA by disregarding the Seniority Roster and employing individuals recommended by movie and T.V. stars at lower rates. Moreover, Plaintiffs filed several grievances with Local 727 which failed to resolve the alleged hiring by Disney of individuals outside of the Seniority Roster. When Plaintiffs' remedies through the union proved fruitless, they sued.

II. PROCEDURAL HISTORY

The Complaint, filed on August 24, 1995, alleged a number of causes of action, including civil claims for violations of R.I.C.O. (18 U.S.C. §§ 1962 and 1964). On November 6, 1995, this Court dismissed Plaintiffs' R.I.C.O. claim. A few weeks later, Plaintiffs filed a First Amended Complaint, alleging the following causes of action: (1) breach of contract under the Labor Management Relations Act ("LMRA"); (2) breach of the duty of fair representation against Local 727 and Defendant

Pamela Mack; (3) civil R.I.C.O. violations;[1] (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. On January 19, 1996, this Court dismissed Plaintiffs' state law claims. Defendant Mack was dismissed on April 16, 1996. As a result, only the first two causes of action remain.[2]

III. MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs seek leave to file a Second Amended Complaint, hoping to allege state and federal claims for age discrimination. In their motion, Plaintiffs claim that only in discovery were they made aware that such a cause of action could exist. For a number of reasons, this Court DENIES Plaintiffs' Motion.

Once the pleadings are closed, as they are here, a complaint may be amended only by leave of the court or by written consent of the adverse party. Fed. R. Civ. P. 15(a). The standard for allowing amendment is generally

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[1] Plaintiffs' First Amended Complaint alleges R.I.C.O. violations on the cover page, but not in the text of the Complaint itself. As Plaintiffs' R.I.C.O. claims had been dismissed just over three weeks before the First Amended Complaint was filed, this Court presumes that Plaintiffs simply neglected to edit the R.I.C.O. allegation from the cover page. Therefore, to set the record straight, Plaintiffs' civil R.I.C.O. claims are hereby DISMISSED for the reasons as indicated over a year ago.

[2] Plaintiffs' second cause of action, for breach of the duty of fair representation, is implied in 29 U.S.C. § 185. *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980).

liberal, as leave "shall be freely given when justice so requires." *Id.*

In this case, however, the interests of justice favor denial of the motion. Plaintiff noticed its motion for February 10, 1997, on the last motion hearing date. Therefore, if leave were granted, one of two things would happen. Under one scenario, Defendants would be unable to file any dispositive motions on Plaintiffs' new claims, and would have to proceed to trial without a prepared defense. In the other scenario, because these new claims raise an entirely different set of issues and facts, discovery would have to be reopened, the instant motions for summary judgment would no longer be ripe, and the trial date would have to be vacated. In either case, Defendants would be substantially prejudiced. *See Ansam Assoc., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985).

Also, Plaintiff has previously amended its Complaint once before. Not until the eleventh hour of this litigation has it dawned on Plaintiffs that claims for age discrimination might exist. *See Mir v. Forsburg*, 646 F.2d 342, 347 (9th Cir. 1980). This delay is further made egregious by the fact that Plaintiffs had prior knowledge of these issues and failed to raise them in a timely manner.[3] *Jordan v. Los Angeles County*, 669 F.2d 1311, 1324 (9th Cir. 1982).

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[3] Plaintiffs' knowledge of this issue is evidenced by the deposition testimony of Plaintiff Wills himself, who, based on over *24 years* of working in show business, believed that age discrimination occurred on a continuous basis. *See* Declaration of William Cole, Exhibit 1. Accordingly, Plaintiffs cannot credibly claim that they were without knowledge of the alleged abuses at the time the Complaint or the First Amended Complaint was filed.

Defendants also correctly note that Plaintiffs' motion should be denied because amendment would be futile. Plaintiffs' claims of age discrimination are procedurally defective because Plaintiffs have not exhausted their administrative remedies as required by 29 U.S.C. § 626 and California law. Plaintiffs' claims would also be barred by the applicable Statutes of Limitations, 29 U.S.C. § 626(d) and Cal. Gov't Code § 12960.[4]

IV. SUMMARY JUDGMENT STANDARD

Defendant Local 727 and Disney Defendants move independently for summary adjudication or, alternatively, summary judgment on Plaintiffs' claims pursuant to Fed. R. Civ. P. 56. Summary judgment is proper where, based on the appropriate materials submitted, the moving party shows that there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Summary adjudication is appropriate where there exists no genuine issue of material fact as to a particular claim or defense. William W. Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 14:33 (1995).[5] Where the moving party satisfies its burden, the non-moving party may not rest on its pleadings or allegations;

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[4] Defendant Local 727 requests that this Court issue to Plaintiffs an OSC re: Sanctions for bringing the instant motion. Although Plaintiffs' counsel's performance in this matter has been occasionally suspect, it is not clear whether his tactics have been dilatory. Therefore, Local 727's request is hereby DENIED.

[5] Motions for summary adjudication are commonly referred to as a motions for partial summary judgment, though this is improper, as no "judgment" actually occurs. Schwarzer at § 14:34.

it must set forth specific facts showing that no genuine issue of material fact exists. Fed. R. Civ. P. 56(e).

V. LOCAL 727'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs' sole remaining claim against Defendant Local 727 is that the Local breached its duty of fair representation against Plaintiffs Wills and Thurwell. A union breaches its duty of fair representation "only when a union's conduct is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A cause of action arises if the union ignores a meritorious grievance or pursues that grievance in a perfunctory manner. *Id.* at 191. "A union's decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment." *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir. 1994). Under this standard, the Ninth Circuit has never held that a union acts in an arbitrary manner "where the challenged conduct involved the union's judgment as how to best handle a grievance." *Id.* To the contrary, a union cannot be liable for judgments made in good faith and without discrimination. *Id.*

A. THE STUDIO SENIORITY ROSTER

Pursuant to the CBA between Local 727 and Defendant Disney, Disney maintained a Studio Seniority Roster. Hiring preferences were to be given to members of the Studio Seniority Roster ahead of other Local 727 members. Both Plaintiffs were listed on the Studio Seniority

Roster. Both Plaintiffs assert that Local 727 failed to adequately pursue grievances when Disney allegedly breached the CBA.

This hiring preference, however, was not absolute. If no senior union members were available for hiring, work could be given to junior union members. Further, the CBA extends only to the geographical boundaries of Los Angeles County, though the CBA does apply to certain situations where production occurs outside of Los Angeles County. Finally, a member of the Roster could also be removed in the event of an unauthorized leave of absence.

B. "IN THE ARMY NOW"

In February 1994, Disney began production on the feature film "In the Army Now." Disney initially hired one craft service worker on this film. After not being hired for this production, Plaintiff Wills requested that the Local 727 file a grievance with Disney.

Local 727 claims that it looked into the matter, but determined that Wills was employed on another production at the time, and was unavailable for hiring.[6] Later, Disney added another worker when Plaintiffs were available in violation of the CBA. Local 727 filed a grievance for this second hiring and received a settlement in the amount of $800 from Disney ($400 for each Plaintiff). Local 727 claims that Plaintiff Wills agreed to accept his share. Wills disputes this, even though the settlement

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[6] Plaintiff Wills disputes that he was unavailable at the time of hiring on "In the Army Now."

check sent to him was cashed. Plaintiff Thurwell did not agree to the settlement and did not return the phone calls of Local 727 Representative Pamela Mack.

Accepting genuine disputes of fact in favor of the non-moving party, summary disposition is appropriate here. On Plaintiff Wills's request, Local 727 filed two grievances, and eventually came to a settlement with Disney. Although Plaintiffs may not have been happy with the end result, it cannot be said that Local 727 breached its duty because the union pursued a grievance procedure and netted a successful result. Further, Mr. Wills's claim that he did not agree to the settlement is a non-genuine issue of fact, as his settlement check was promptly cashed.

C. "MR. WRONG"

Again, at Plaintiff Wills's request, Local 727 filed a grievance with Disney over the hiring of craft service workers on "Mr. Wrong." Local 727 claims that this grievance was meritless because Wills was engaged in other employment at the time of hiring on this production. Plaintiffs do not dispute this. They merely allege that Disney failed to contact Wills before hiring another worker. If that is the case, Plaintiffs had no valid grievance, and Local 727 correctly judged so. Therefore, summary disposition is proper here.

D. "PHENOMENON"

After this lawsuit was filed, Plaintiff saw the film "Phenomenon" and, after viewing the credits, asked

Local 727 to file a grievance. Upon investigation, Local 727 determined that the production had been filmed in Northern California, outside the scope of the CBA. As a result, Local 727 did not pursue the grievance. Plaintiffs claim that the work was within the scope of the CBA, as the worker was hired by a producer within Los Angeles County to work on an outside production.

Assuming Plaintiffs' allegation to be true, summary disposition is still proper. If Plaintiffs are correct, union representative Mack was at worst guilty of negligently interpreting the CBA (in this Court's opinion, she did not). Such a mistake, however, does not rise to the level of breach of the duty of fair representation.

E. OTHER PRODUCTIONS

Plaintiffs allege that Local 727 breach its duty of fair representation with regard to a number of other productions. Defendant argues that Plaintiffs never requested that grievances be filed on any of these films (this is undisputed). Also, Local 727 alleges that Plaintiffs were employed at all relevant times and thus unavailable for hiring. Plaintiffs dispute this, though their deposition testimony is clearly to the contrary. Because of that, and because Plaintiffs never requested that grievances be filed, summary disposition is also appropriate as to these claims.

F. PLAINTIFF THURWELL'S RESIGNATION

Also, Defendant Local 727 argues that in June 1995, Plaintiff Thurwell resigned from Disney and the Studio

Seniority Roster when Mr. Thurwell took a one year position on "Beverly Hills, 90210" for Aaron Spelling Productions and Twentieth Century-Fox Television.[7] Thurwell denies that he resigned, and claims that he had permission from Disney to take an authorized leave of absence.

Plaintiff Thurwell's position is meritless. First, Thurwell offers no proof beyond his own declaration that his absence was authorized. Second, by taking a one year job with another company, Mr. Thurwell was taking an exceptionally long leave of absence which was of a permanent nature. Therefore, Thurwell's position that he did not resign is a non-genuine dispute of fact.

Further, the dispute is not material to Plaintiff Thurwell's claim against Local 727. It is undisputed that after complaining to Local 727, Mr. Thurwell refused to make himself available for further investigation, failing to return phone calls and neglecting to respond to written correspondence. As Mr. Thurwell's testimony would be the only proof that he did not resign, his complete failure to cooperate with Local 727 made it impossible for the union to pursue Plaintiff's grievance. Therefore, Local 727 cannot be held liable for its inability to pursue the underlying grievance, and this claim cannot prevail.

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[7] Plaintiff Thurwell took this position after working exclusively with Disney for over thirty years.

F. SUMMARY

Therefore, because all issues may be decided on summary proceeding in favor of Defendant Local 727, Defendant's motion is hereby GRANTED.

VI. DISNEY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

Plaintiffs also claim that Disney Defendants breached the CBA by engaging in the hiring practices mentioned previously.

A. PLAINTIFFS' CLAIMS CANNOT PREVAIL AT TRIAL

On a number of the productions cited in the arguments, it is clear that Plaintiffs cannot prevail on any of them. Disney Defendants have provided substantial evidence indicating the following: (1) Wills was unavailable to be hired on the productions "In the Army Now." "The Rock." "Nothing to Lose," "Crimson Tide," "Father of the Bride II," and "Mr. Wrong";[8] (2) Disney was not the producer of the films "Puppet Masters," "Up Close and Personal," and "Terminal Velocity"; (3) except for days when he requested to be off, Plaintiff Thurwell worked every available date from his start date in 1965 to the day

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[8] Nothing in the CBA allows members on the Seniority Roster to choose assignments. Plaintiffs seem to believe that they should have been entitled to leave one production to go work on another. To the contrary, if the member is already working when a new hiring occurs, that member is unavailable and ineligible for priority under the CBA.

he left Disney in 1995; (4) Thurwell left Disney in 1995, making himself unavailable for "Phenomenon" and "Jack"; (5) when Thurwell resigned, he removed himself from the seniority roster; and (6) Wills settled his grievance with Disney on "In the Army Now" by cashing the settlement check.[9] Plaintiffs protestations to the contrary are merely that, and none of their assertions are supported by any credible proof.

Plaintiff Wills's claims with regard to "Jack" and "Phenomenon" also cannot succeed. The CBA provides that it is applicable to productions inside Los Angeles County. The CBA also covers situations where members are "hired by the producer in the County of Los Angeles to perform services outside the said County." "Jack" and "Phenomenon" were produced entirely outside of Los Angeles County. Plaintiff essentially argues that the language "in the County of Los Angeles" modifies the term "producer" in the CBA. Defendants argue that the phrase modifies the term "hired."

This is arguably a close question of interpretation. If the term modifies "producer," Plaintiff survives summary judgment. If the phase modifies "hired," the claim cannot survive because the crew workers were hired outside of Los Angeles.

Ultimately, Defendants' interpretation prevails. As a practical matter, a hiring can occur inside or outside of

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[9] Wills argues that he did not cash the settlement check, but that his wife did on his behalf. In my opinion, this argument is irrelevant. If she had authority to cash the check, the doctrine of accord and satisfaction bars Plaintiff Wills's claim on this point.

L.A. County. The signatory producer, however, is always in Los Angeles County. Therefore, under Plaintiff's interpretation, the phrase "in the County of Los Angeles" becomes meaningless.[10] The phrase must have been included for a reason, probably to make the CBA applicable to all union hiring that occurred within Los Angeles County. This did not happen, however as all hiring took place in Northern California.

B. STATUTE OF LIMITATIONS

Two of Plaintiff's claims, regarding the productions "In the Army Now" and "Crimson Tide" are also barred by the statute of limitations. Under actions such as this, a six month statute of limitations applies. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983). A cause of action accrues when a plaintiff knows or should know of a defendant's wrongdoing. *Allen v. United Food & Commercial Workers Int'l Union*, 43 F.3d 424, 427 (9th Cir. 1994). In this case, Plaintiffs did not file suit until August 24, 1995, more than six months after the union allegedly failed to pursue Plaintiffs' grievances. Therefore, these claims are time-barred.[11]

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[10] Of course, under Defendants' interpretation, the words "by the producer" also become meaningless. That is no matter, though, because *every* hiring that falls under the CBA is made by a signatory producer.

[11] Plaintiffs did not argue this issue in their Opposition to Disney Defendants' summary judgment motion.

C. INDIVIDUAL DEFENDANTS

Finally, individual Defendants Metcalf and Shook point out that Plaintiffs cannot assert a claim against them for breach of a labor agreement, as they were not parties to the CBA. Plaintiffs do not oppose this issue, and it is clear that individual liability may not be asserted for breach of such a contract.

V. CONCLUSION

In sum, this Court hereby DENIES Plaintiffs' Motion to File a Second Amended Complaint. Defendant Local 727's request for Sanctions is DENIED. All Defendants' Motions for Summary Judgment are hereby GRANTED. Finally, because summary judgment is granted in favor of Defendants, Local 727's Application to continue to trial date is MOOT.

IT IS SO ORDERED.

DATED: March 4, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. WILLS, et al.,	CV 95-5716 JMI (VAPx)
Plaintiffs,	**JUDGMENT**
v.	(Filed March 5, 1997)
WALT DISNEY PICTURES AND TELEVISION, INC., et al.,	
Defendants.	

IT IS HEREBY ORDERED:

Defendants' Motions for Summary Judgment came before this Court on March 3, 1997. In the Order filed herewith, this Court GRANTED Defendants' Motions for Summary Judgment. This Court has determined that no triable issue of fact remains and that all Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

DATED: March 4, 1997

/s/ James M. Ideman
James M. Ideman
United States District Judge